IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.639 OF 1994

Laxman R. Vajage
of Bombay, adult, Indian
Inhabitant, residing at
German Chawl, 2nd floor,
Room No.62, Tulsiwadi,
Tardeo, Bombay-400 034. .... Petitioner

- Versus -

1. The Collector of Bombay,
(City) having his office at
Old Custom House, Bombay.

2. The Hon'ble Commissioner
State Excise, having his
office at Old Custom
House, Bombay.

3. The State of Maharashtra .... Respondents

ALONG WITH

WRIT PETITION NO.1252 OF 1995

Surendra Singh Somaya Singh
of Bombay, adult, Indian
Inhabitant, residing at
B-8, Dhanlaxmi Building,
Golibar Road, Ghatkopar
(West), Bombay-400 086. .... Petitioner

- Versus -

1. The Collector of Bombay,
(City) having his office at
Old Custom House, Bombay.

2. The Hon'ble Commissioner
State Excise, having his
office at Old Custom
House, Bombay.

3. The State of Maharashtra .... Respondents

Ms Veena Thadani with Shri Vishal Thadani
for the Petitioner in both the Petitions.

Shri G.W. Mattos, Asst. Government Pleader,
for the Respondents in both the Petitions.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: SEPTEMBER 01, 2004

ORAL JUDGMENT:

1. Since common questions of law and facts arise in both these petitions, they were heard together and are being disposed of by this common judgment.

2. The petitioners challenge the orders passed by the respondents rejecting the applications for revalidation of their liquor permits - one in relation to country liquor, namely Licence CL-III and another in relation to Indian made foreign liquor in the form of FL-II being totally arbitrary one and in contravention of the provisions of law.

3. The undisputed facts in both the petitions are that the applications for revalidation of the liquor licences of the petitioners, like many other applicants, during the relevant time, were rejected on the ground that they were filed beyond the cut-off date fixed by the Government for filing such application. It is the case of the respondents that the Government from time to time

pursuant to the circulars issued had fixed the cut-off date for the purpose of filing applications for revalidation of the liquor licences which were not being utilised for number of years after having obtained such licences and the petitioners having not filed the applications for revalidation prior to the cut-off date stipulated under such circulars, their applications were lawfully rejected. It is the case of the respondents that in terms of the provisions of law contained in Section 139(1)(n) of the Bombay Prohibition Act, 1949, hereinafter referred to as "the said Act", the Government is empowered to issue such circulars and instructions in the absence of rules being framed in that regard under Section 143 of the said Act, and as there were no rules framed in relation to the procedure for revalidation as well as the time limit within which the same could be done, the necessary circulars were issued by the Government and since the applications for revalidation of licence were not in consonance with those circulars and were not filed within the time stipulated under those circulars, the orders passed by the authorities in the case in hand cannot be found fault with.

4. The learned Advocate appearing for the petitioners, while assailing the impugned orders, drawing attention to Section 139(1)(n) of the said Act fairly submitted

that the power of the Government to issue such circulars cannot be disputed. However, the circulars to be issued under the said provision of law, when they relate to the matter affecting a class of persons or the subject-matter dealt with under such circular is of general nature affecting a class of persons, those circulars are necessarily required to be published in official gazette and the provision of law contained in sub-section (2) of Section 139 of the said Act is very clear in that regard and the same is mandatory in nature and in the absence of compliance of such publication, no legality could be attached to the circulars said to have been issued, and therefore any order passed based on such circulars cannot have legal sanctity and therefore the impugned orders are bad in law and need to be quashed and further the applications of the petitioners for revalidation ought to have been dealt with and decided in accordance with the provisions of law, ignoring the said circulars. In that regard, reliance is sought to be placed in the unreported decision of this Court in the matter of **Mrs. Janaki R. Shetty v. The Collector of Bombay and others,** in Writ Petition No.1917 of 1988, delivered on 6-3-1993 by the learned single Judge of this Court, the decisions of the Apex Court in **Khoday Distilleries Limited and others v. State of Karnataka and others,** reported in (1996) 10 SCC 304, **Raza Buland Sugar Co. Ltd., Rampur v. Municipal**

Board, Rampur, reported in AIR 1965 SC 895 and **State of Maharashtra v. Mayer Hans George,** reported in AIR 1965 SC 722. The learned A.G.P., on the other hand, has submitted that in case of the Writ Petition No.639 of 1994, the application filed for revalidation was not rejected merely on the ground that the same was filed beyond the cut-off date specified in the circulars but it was also rejected on the ground of non-compliance of the directions issued by the authority in relation to production of documents and as the petitioner had failed to produce the said documents. It was also sought to be argued on behalf of the respondents that the petitioners were aware of the circulars in view of the communication dated 30-5-1991, irrespective of the fact that the circulars were not published in the official gazette.

5. Undisputedly, in terms of Clause (n) of Section 139(1) of the said Act the Government is empowered to issue instructions in any matter pertaining to the grant or otherwise of the licences, permits, passes or authorisation under the said Act as the Government may deem proper. However, such instructions issued by the Government in case they are of general nature affecting a class of persons, then the same are required to be notified in the official gazette. The sub-section (2) of Section 139 is very clear in that regard and reads thus:-

> "2. An order made under sub-section (1), shall, if it is of a general nature of affecting a class of persons, be notified in the Official Gazette."

Obviously therefore, the orders or instructions issued in relation to the licences or permits under the said provisions of law and if such orders or instructions are of a general nature affecting a class of persons, those orders or instructions are required to be published in the official gazette in order to have legal sanctity to such orders or instructions. As rightly submitted by the learned Advocate for the petitioners, the provisions of law of sub-section (2) of Section 139 are to be held as mandatory one as it is well-settled that whenever a particular thing is required to be done under a statute in a particular manner, only the manner prescribed for doing such thing is to be adopted and no other procedure can be permissible. Besides, the words used in the said provision in relation to the necessity for publication of such orders or instructions in the official gazette are, "shall be", and the same disclose mandate as the legislature in its wisdom thought it fit to make the publication of such orders in the official gazette compulsory in order to get legal sanctity to such orders. Besides, it stands to reason that such

instructions or orders as they may affect the rights of various persons in relation to the business, even though pertaining to liquor business, certainly the same must be made known to the public and particularly to the persons who are in such business in order to enable them to take appropriate steps to safeguard their business interest.

6. It is also to be noted that the orders specifically prohibit revalidation after a particular cut-off date. In other words, though the statute entitles the parties to know the orders and/or the instructions in relation to any restrictions to be imposed, including relating to the cut-off date, by having published such orders in the official gazette, the said statutory right is sought to be denied on account of failure on the part of the authorities to publish such orders in the manner statutorily required. The point that it is not a fundamental right to have liquor business is totally different and immaterial. When the statute specifically prescribes the mode in which the rule or order to be issued by the Government in exercise of power under Section 139(1) is to be made known to the public and the mode prescribed is by way of publication of such rule or order in the official gazette, the Government cannot be justified in issuing the rules in violation of the said statutory provision. The said provision of law

essentially enures to the benefit of the people in the business or in the field in relation to which such orders are passed, and hence they cannot be kept in the dark or cannot be denied an opportunity to know such orders and rules in the manner in which they are required to be made known under the statutory provisions. The word "shall" in the said provision of law is to be construed as disclosing the mandatory requirement of the publication of such rules and orders in the official gazette. I am fortified in this view by the decisions sought to be relied upon by the learned Advocate for the petitioners and cited above.

7. The learned Advocate for the petitioners is also justified in submitting that though the right to trade in liquor is not a fundamental right, and therefore the persons in such business are not entitled for benefit under Article 19(1)(g) of the Constitution of India, that would not entitle the Government to ignore the mandate of Article 14 of the Constitution of India and to make the orders issued under Section 139(1) of the said Act to be known to chosen few and deny the knowledge thereof to others by flouting the statutory provision in relation to requirement of publication of such orders in the official gazette. Indeed, the Apex Court in **Khoday Distilleries'** case (supra) had clearly ruled that there is no fundamental right in a citizen to

carry on trade or business in liquor; and the State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants such as its manufacture, storage, export, import, sale and possession; nevertheless when the State decides to grant such right or privilege to others, the State cannot escape the rigour of Article 14. The Apex Court in that regard has reiterated its earlier decision in the **State of M.P. v. Nandlal Jaiswal,** reported in (1986) 4 SCC 566.

8. In fact, the matter in relation to exercise of power under Section 139(1)(n) of the said Act and the consequences of failure on the part of the Government to comply with the provision of Section 139 came up before the learned single Judge of this Court in the unreported decision in **Mrs. Janaki Shetty's** case (supra) wherein it was observed that:-

> "Neither the Collector of Bombay nor the Commissioner of Prohibition and Excise was entitled to prescribe such a condition for grant of licence. Even the State Government could not do so except in the manner prescribed by Sections 143 and 139(1) and 139(2) of the Act. Thus the said licence could

> not have been cancelled by the Collector or by the Commissioner of Prohibition and Excise on the ground of alleged breach of non-observance of the said general Circulars which were not notified in the Official Gazette or the condition incorporated in the licence based on Circulars having no legal efficacy."

The Court was dealing with the circular dated 4-9-1987 which was admittedly not published in the official gazette though was required to be published in accordance with Section 139(2) of the said Act.

9. The law thus is very clear that whenever any order or circular is issued in exercise of power under Section 139(1) of the said Act by the Government, the same is required to be published in the official gazette in order to have legal sanctity to such circular, and in the absence of compliance of mandatory provision of sub-section (2) of Section 139, in relation to publication of such rule or order in the official gazette any decision based on the circular which is not so published in the official gazette, cannot be enforceable in law and it would be bad in law ab initio. Certainly therefore, once it is not disputed that the

circular based on which the order rejecting the applications for revalidation was passed, was not published in the official gazette in terms of Section 139(2) of the said Act, the said order also will have to be quashed and set aside being bad in law ab initio. Obviously, the orders passed by the authorities rejecting the applications of the petitioners on the ground that the same were filed beyond the cut-off date specified under the circulars which were not published in terms of Section 139(2) of the said Act, are therefore required to be quashed and set aside.

10. It is sought to be contended on behalf of the respondents, as stated above, that even though the order rejecting the revalidation applications on account of non-compliance of Section 139(2) of the said Act may be invalid, yet the order rejecting such application on account of failure on the part of the petitioners to produce the documents called for cannot be said to be bad in law. Undoubtedly, the orders which are said to be passed rejecting the applications for revalidation on account of failure on the part of the petitioners to produce the documents were also based on the circulars which were issued by the Government in relation to requirement of the documents. Once it is clear that such an order was also passed based on the circulars which were not in compliance with sub-section (2) of

Section 139, it is needless to say that even the said order would be bad in law and merely because it was issued on account of failure on the part of the petitioner to produce the documents, it cannot be said to be valid or an enforceable order. Even such an order will be bad in law ab initio for want of power to pass such order as the same is also based on the circulars which have no legal sanctity.

11. Referring to the Writ Petition No.1252 of 1995, it was also sought to be contended on behalf of the respondents that statutory remedies in the form of appeal and revision were also sought to be exhausted by the petitioner without any success as they were beyond the period of limitation. One fails to understand the logic behind the said argument as once the initial order is to be held as bad in law ab initio, even failure on the part of the parties to challenge such order by way of appeal or revision either within time or beyond the period of limitation will hardly make any difference as an order passed without jurisdiction is a nullity and can be challenged in writ petition without exhausting the alternative remedies and the law in that regard is well-settled. It is also to be noted that the points relating to bar of limitation was not raised before the concerned authority and it has been pointed out by the learned Advocate for the petitioners that the appeal was

not rejected on the ground of bar of limitation. In any case, it is too late in the day for the respondents to raise the plea of limitation.

12. Needless to say that the observations made herein relating to the illegality of the orders passed by the respondent-authorities on the applications for revalidation filed by the petitioners in both the petitions, based on the circulars and instructions which were not published in accordance with the provision of law required under Section 139(2) would entitle the petitioners to seek reconsideration of those applications afresh by the respondent-authorities in accordance with the provisions of law and without adhering to the cut-off date prescribed under the circulars which cannot be binding upon the petitioners for the reasons stated above. Such circulars cannot be henceforth binding upon others unless they are published in accordance with the provision of law required under Section 139(2) of the said Act. However, it is made clear that the direction for reconsideration of the petitioners' applications in the case in hand is being given in the peculiar set of facts of this case and the petitioners having approached the Court, without delay, to challenge the action on the part of the respondent-authorities rejecting their applications for revalidation. The authorities are expected to consider

the applications of the petitioners within a period of twelve weeks from today.

13. The petitions accordingly succeed. The impugned orders are therefore quashed and set aside. The respondents to consider the applications filed by the petitioners for revalidation of their licences in accordance with the provisions of law, ignoring the said circulars and the provisions relating to the cut-off date prescribed under the said circulars. The rule in both the petitions is made absolute in above terms with no order as to costs.